



17 August 2022

Megan Pitt
Chief Executive Officer | Legal Services Council
Commissioner for Uniform Legal Services Regulation

Via email: submissions@legalservicescouncil.org.au

Dear Ms Pitt,

Submission in response to consultation paper on conditional costs agreements

Thank you for your letter dated 18 July 2022 inviting submissions in response to the Legal Services Council's consultation paper on conditional costs agreements, and specifically your invitation for feedback on the draft *Legal Profession Uniform General Amendment (Conditional Costs Agreements) Rule (No 2) 2022 (the amendment)*.

Your letter noted that the Legal Services Council is interested to hear from legal practitioners about any impact the amendment may have on the provision of pro bono legal services. This letter constitutes a submission from the Australian Pro Bono Centre (**Centre**) in response to the amendment.

The Centre is the national centre of leadership for pro bono legal services, aiming to grow participation and excellence in pro bono. To summarise the Centre's perspective, we think the amendment would be unlikely to have a significant impact on pro bono legal services because:

- minimal pro bono legal work is carried out in the areas of law covered by the amendment; and
- conditional costs agreements do not fall within the Centre's definition of pro bono legal services.

Minimal pro bono legal work is undertaken in family law matters generally

The Centre is unaware of the extent to which conditional costs agreements are currently used in the proceedings specified in the amendment. However, we note that our research indicates that in family law generally, very little pro bono legal work is done by large and mid-sized firms, despite the high level of unmet legal need in that area.¹

According to the Centre's 2021 *Report on the 7th National Law Firm Pro Bono Survey*, family law was the area of law for which large Australian firms rejected the most requests for pro bono assistance.² In every such survey conducted by the Centre since 2008, firms have nominated family law as one of the top two most rejected areas of law.³ In the 2021 Report, only 11% of firms nominated family law as one of their top five areas of law and practice for individuals.⁴

¹ Australian Pro Bono Centre, [Submission No 113](#) to the Joint Select Committee on Australia's Family Law System, Parliament of Australia, *Inquiry into Australia's Family Law System* (December 2019) 6; Australian Pro Bono Centre, *Pro bono legal services in family law and violence: Understanding the limitations and opportunities (Final Report)*, October 2013) 16 – 18.

² Australian Pro Bono Centre, [Report on the 7th National Law Firm Pro Bono Survey](#) — *Australian firms with fifty or more lawyers* (Report, February 2021) 46-47.

³ *Ibid* 47.

⁴ *Ibid* 40.

Indeed, page 7 of the consultation paper notes that “*the vast majority of parties involved in guardianship, adoption and child protection proceedings are either government representatives or are legally assisted through Legal Aid or the Aboriginal Legal Service or are self-represented. Therefore, the benefit of a conditional costs agreement to a client would not often arise.*”

As such, the Centre considers it likely that even if the amendment prevents some clients who would have used conditional costs agreements from accessing private legal representation, this demographic will most likely turn to Legal Aid and community legal assistance given the lack of pro bono legal work undertaken by firms in these areas of law. The inability of the pro bono sector to pick up this work highlights the ongoing need for sufficient funding of community legal centres and Legal Aid Commissions.

Conditional costs agreements do not fall within the definition of pro bono legal services

The Centre also notes that the amendment is unlikely to impact pro bono legal services because it prohibits agreements which already do not fall within the definition of pro bono legal work.

There is no universally accepted definition of what is meant by ‘pro bono’ legal work. However, the Centre’s definition is widely accepted and used in Australia, including by the federal and some state governments and 93 percent of the respondents to the [Fifth National Law Firm Pro Bono Survey](#).⁵ The [Centre’s definition of pro bono legal services](#) explicitly excludes contingency fee arrangements or other speculative work which is undertaken with a commercial expectation of a fee (see **Attachment 1** paragraph 8).

Conditional costs agreements are distinct from contingency fee arrangements (which are already prohibited under the Uniform Law). However, they do fall within the category of speculative work undertaken with a commercial expectation of a fee. The agreements are speculative because there is a risk of non-payment for the practitioner entering into a conditional agreement, and conditional costs agreements are always entered into with the commercial expectation of a fee upon the successful outcome of the matter.

As such, conditional costs agreements are ordinarily excluded from being regarded as pro bono work.⁶ This means that the amendment seeks to prohibit agreements that are not typically defined as pro bono work and therefore the amendment is unlikely to impact pro bono legal services.

⁵ See page 21 of the *Report on the Fifth National Law Firm Pro Bono Survey* (2017). The Centre’s definition has also been adopted by the Commonwealth Whole of Australian Government Legal Services Panel (see *Legal Services Directions 2017* (Cth) Appendix F paragraph 2), the NSW Government Legal Services Panel and the SA Crown Solicitor’s Office Pre-qualification Register. The Western Australian Pro Bono Legal Services Model also largely adopts the Centre’s definition.

⁶ In some litigious matters, pro bono lawyers may use a particular form of conditional fee arrangement whereby a client agrees to pay their pro bono lawyer in the event of successfully achieving a costs order in their favour. These arrangements exist to create an even playing field on the question of costs in a dispute. Work done by lawyers pursuant to that arrangement will still usually be regarded as pro bono work in circumstances where costs recovered are reinvested into a firm’s pro bono program, donated to a charity or community organisation or used to pay disbursements. More information on this topic can be found on the Centre’s website [here](#).

We hope our submission is of assistance to the Legal Services Council. Please contact us if we can be of further help.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Gabriela Christian-Hare', written in a cursive style.

Gabriela Christian-Hare
Chief Executive Officer

Attachment 1 – The Centre’s definition of pro bono legal services

The following is regarded as pro bono work by the Centre:

1. Giving **legal assistance for free or at a substantially reduced fee** to:
 - a. individuals who can demonstrate a need for legal assistance but cannot obtain Legal Aid or otherwise access the legal system without incurring significant financial hardship; or
 - b. individuals or organisations whose matter raises an issue of public interest which would not otherwise be pursued; or
 - c. charities, other not-for-profit organisations or social enterprises, in each case where their sole or primary purpose is to work in the interests of low income or disadvantaged members of the community, or for the public good;
2. Conducting **law reform and policy work** on issues affecting low income or disadvantaged members of the community, or on issues of public interest;
3. Participating in the provision of **free community legal education** on issues affecting low income or disadvantaged members of the community or on issues of public interest; or
4. Providing **a lawyer on secondment** at a community organisation (including a community legal organisation) or at a referral service provider such as a Public Interest Law Clearing House.

The following is *not* regarded as pro bono work by the Centre:

5. Giving legal assistance to any person for free or at a reduced fee without reference to whether that person can afford to pay for that legal assistance or whether that person’s case raises an issue of public interest;
6. Free first consultations with clients who are otherwise billed at a firm’s normal rates;
7. Legal assistance provided under a grant of legal assistance from Legal Aid;
8. **Contingency fee arrangements or other speculative work which is undertaken with a commercial expectation of a fee; [emphasis added]**
9. The sponsorship of cultural and sporting events, work undertaken for business development and other marketing opportunities; or
10. Time spent by lawyers sitting on the board of a community organisation (including a community legal organisation) or a charity.